IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

AMY BALDRY,
Plaintiff,

OPINION & ORDER

v.

12-cv-478-wmc

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

Defendant.

Pursuant to 42 U.S.C. § 405(g), plaintiff Amy Baldry seeks judicial review of a final determination by the Commissioner of Social Security finding that Baldry was not disabled within the meaning of the Social Security Act. Baldry principally contends that remand is warranted because the questions to the vocational expert, as framed by the Administrative Law Judge ("ALJ"), failed to address her mental limitations regarding concentration, persistence and pace. For the reasons set forth below, the case will be remanded to the Commissioner for rehearing.

FACTS

I. Procedural Background

On June 8, 2009, Baldry applied for Supplemental Security Income ("SSI"). (AR 19.) Although she alleged an onset date of January 1, 2002, a person cannot obtain SSI without filing an application. Thus, the onset date is claimant's application date, which in Baldry's case is June 8, 2009. After denials at the initial and reconsideration levels, Baldry requested a hearing, appearing and testifying before ALJ Robert Iafe (AR. 69-82,

93-96.) On January 28, 2011, the ALJ determined that Baldry was not disabled because she could perform a significant number of jobs in the economy. (AR 19-30.) After the Appeals Council declined review (AR 14-15), Baldry filed a timely complaint for judicial review in this court pursuant to 42 U.S.C. §405(g).[1]

II. Medical Background

Baldry has a longstanding history of mental illness. Her earliest mental health records were provided by Chippewa County Community Mental Health & Recovery. Those documents chart Baldry's course of treatment beginning in June of 2006, when she was seen on an emergent basis after being found intoxicated by her husband. (AR 23.) Baldry was assessed with depression, with counselling recommended and medication prescribed, including Seroquel, among other anti-depressants. (AR 566.) Despite treatment, Baldry continued to exhibit symptoms of depression.

Baldry's detailed medical history from 2006 through 2010 is addressed in her brief. (Pl.'s Opening Br. (dkt. #113) 2-20.) The Commissioner's brief has also been helpful in this regard. Because this case examines the sole issue of whether the ALJ has failed to address Baldry's mental limitations regarding concentration, persistence and pace, the court need not examine, much less set forth in detail, most of this evidence[2] (nor most of the ALJ's decision).

[1] The citations in this Order are drawn from the Administrative Record ("AR"). (Dkt. #8.)
[2] James Rugowski, M.D., who opined that the claimant has many moderate limitations in work-related mental activities is illustrative of evidence that *is* important to disposition of this case. (AR 28.) Dr. Rugowski's evidence is addressed later in this opinion.

III. ALJ Decision

On January 28, 2011, ALJ Iafe issued a decision denying Baldry's application for SSI. At step one, the ALJ found that Baldry had not engaged in substantial gainful activity since the date she filed her SSI application, June 8, 2009. (AR 21.) At step two, the ALJ identified polysubstance abuse, drug-induced mood disorder, post traumatic stress disorder, bipolar disorder, and anxiety disorder as severe impairments, but found, at step three, that Baldry did not have an impairment or combination of impairments that met or medically equaled the severity of any listed impairment. (AR 21.)

In reaching this latter finding, the ALJ determined that Baldry had moderate difficulties with respect to concentration, persistence and pace. (AR 22.) Specifically, the ALJ found:

> In activities of daily living, the claimant has mild restriction. She is able to bathe herself, dress herself, groom herself, feed herself, and toilet herself without assistance or apparent difficulty. She is able to perform household chores including cleaning, cooking and the doing the laundry. In social functioning, the claimant has moderate difficulties. She has reported difficulties maintaining stable relationships with her family and her children. The claimant's reports are relatively consistent with the medical evidence of record and the undersigned has accounted for these limitation in the residual functional capacity finding contained herein. **With regard to concentration, persistence or pace, the claimant has moderate difficulties. In multiple clinical tests throughout the record the claimant has exhibited deficits in her ability to concentrate and maintain a competitive work pace.**

(*Id.* (emphasis added).)

Between steps three and four, the ALJ determined Baldry's residual functional capacity ("RFC") allowed her to perform a full range of work at all exertional levels, but

that she was limited to work activity requiring only occasional interaction with others and to work activity requiring only few workplace changes. (AR 22). At step four, the ALJ determined that Baldry could not perform any of her past relevant jobs. (AR 29). Finally at step five, referring to the testimony of the vocational expert, and the medical vocational guidelines, the ALJ found that Baldry could perform a significant number of jobs in the economy, including light exertional jobs as a housekeeper. (AR 29-30).

OPINION

When a federal court reviews a final decision by the Commissioner of Social Security, the Commissioner's findings of fact are "conclusive," so long as they are supported by "substantial evidence." 42 U.S.C. § 405(g). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). When reviewing the Commissioner's findings under § 405(g), the court cannot reconsider facts, re-weigh the evidence, decide questions of credibility or otherwise substitute its own judgment for that of the administrative law judge. *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000).

Even so, a district court may not simply "rubber-stamp" the Commissioner's decision without a critical review of the evidence. *See Ehrhart v. Sec'y of Health and Human Servs.,* 969 F.2d 534, 538 (7th Cir. 1992). A decision cannot stand if it lacks evidentiary support. *Steele v. Barnhart*, 290 F.3d 936, 940 (7th Cir. 2002). The ALJ must also explain his "analysis of the evidence with enough detail and clarity to permit meaningful appellate review." *Id.; see Herron v. Shalala*, 19 F.3d 329, 333–34 (7th Cir. 1994). When

the administrative law judge denies benefits, he must build a logical and accurate bridge from the evidence to his conclusion. *Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001).

Baldry principally contends that the ALJ erred in omitting her moderate limitations in concentration, persistence and pace ("CPP") from the hypothetical questions posed to the vocational expert ("VE"). Hypothetical questions posed to the VE "ordinarily must include all limitations supported by medical evidence in the record." *See Steele v. Barnhart*, 290 F.3d 936, 942 (7th Cir. 2002); *see also Kasarsky v. Barnhart*, 335 F.3d 539, 544 (7th Cir. 2003).

Here, the ALJ determined that Baldry was moderately limited in CPP. Dr. Rugowski's report addressing Baldry's moderate limitations in CPP underscores the potential importance of these limitations. As identified in the decision, the ALJ expressly states that portions of Dr. Rugowski's evidence were "in fact, consistent with the objective medical evidence." (AR 28) For instance, the ALJ said, that "the claimant is limited to simple tasks and simple work related decisions, which are limitations consistent with the moderate limitations in her ability to understand, remember, and carryout detailed instructions, and her ability to maintain attention and concentration for extended periods noted by Dr. Rugowski." (AR 28.) Since limitations with respect to CPP were not put to the vocational expert during the ALJ hearing, and since Dr. Rugowski's evidence was otherwise afforded weight with respect to these limitations, the court has little choice but remand.

Yet the hypothetical question(s) to the vocational expert limited Baldry to "simple tasks and simple work related decisions." (AR 88-91.) This language does not, however, include a CPP limitation. As Baldry out, this omission was criticized by the Seventh Circuit in *O'Connor–Spinner v. Astrue*, 627 F.3d 614, 619 (7th Cir. 2010). In *O'Connor–Spinner,* the state examiner and the ALJ concluded that the claimant had moderate limitations in CPP because of her depression, but the ALJ purported to account for these limitations by asking the VE to consider only a "hypothetical worker [who] was restricted to routine, repetitive tasks with simple instructions." 627 F.3d at 617. On appeal, the Seventh Circuit rejected the Commissioner's argument that the limitation to routine and repetitive tasks "implicitly incorporated" limitations for concentration, persistence and pace because "[t]he ability to stick with a given task over a sustained period is not the same as the ability to learn how to do tasks of a given complexity." *Id.* at 620. The court further noted that limiting a hypothetical worker to routine repetitive tasks did not "adequately orient the VE to the totality of a claimant's limitations." *Id.* While some exceptions exist to this general rule, the Seventh Circuit stated that the ALJ should refer "expressly to limitations on concentration, persistence, and pace in the hypothetical in order to focus the VE's attention on these limitations and assure reviewing courts that the VE's testimony constitutes substantial evidence of the jobs a claimant can do." *Id.* at 619-20.

Likely because none apply, the Commissioner offers none of the exceptions recognized in *O'Connor–Spinner* to excuse the ALJ's deficient hypothetical.[3] Having failed

[3] The exceptions include: "(1) where the record revealed that the VE had reviewed the claimant's

to argue an exception, the Commissioner has effectively waived them. The ALJ having found Baldry moderately limited for CPP, failed to translate those limitations into questions proposed to the VE, and identified no exception in *O'Conner-Spinner*, remand is necessary to determine whether there are jobs available that Baldry could undertake.

Still, the Commissioner would differentiate *O'Connor-Spinner* from the instant case by arguing that -- because the two state agency physicians found that Baldry only had *mild* restrictions with respect to CPP -- there is evidence in the record that contrasts with the facts in *O'Connor-Spinner* in so far as the state agency physicians in that case found moderate limitations. Even if the court accepted this distinction, it would then be required to infer that: (1) the ALJ got it wrong when he found express moderate limitations in CPP; and (2) the ALJ failed to properly weigh the state agency physicians' evidence over that of Dr. Rugowski. Neither of these inferences seems reasonable, nor does the case law support the Commissioner's argument. Certainly, there is nothing of substance in the record to support either inference. Even if there were, it is for the ALJ to weigh and reconcile evidence in the record, not the court. *Clifford* 227 F.3d 869 (the district court cannot reconsider facts, re-weigh the evidence, decide questions of credibility or otherwise substitute its own judgment for that of the administrative law judge).

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medical records or heard testimony about the limitations; (2) where the ALJ used alternative phrasing and "it was manifest that the ALJ's alternative phrasing specifically excluded those tasks that someone with the claimant's limitations would be unable to perform; or (3) where the ALJ's hypothetical question specifically mentioned the underlying condition that caused the difficulties with concentration, persistence, and pace." *See O'Connor–Spinner*, 627 F.3d at 619–20.

In the end, the Commissioner's half-hearted argument for distinguishing this case from *O'Connor–Spinner* is telling, particularly given the Seventh Circuit's repeated criticism of the Commissioner for continuing "to defend the ALJ's attempt to account for mental impairments by restricting the hypothetical to "simple tasks" despite the Seventh Circuit and its "sister courts continu[ing] to reject the Commissioner's position." *See Stewart v. Astrue*, 561 F.3d 679, 685 (7th Cir. 2009). Indeed, the Commissioner's rebuttal is nothing more than a post hoc argument that reinforces the need for remand.[4] *See Spiva v. Astrue,* 628 F.3d 346, 353 (7th Cir. 2010) (finding disfavor with "the Justice Department's lawyers who defend denials of disability benefits [on bases]. . . not relied on by the administrative law judge"); *Parker v. Astrue*, 597 F.3d 920 (7th Cir. 2010); *Alexander v. Barnhart*, 287 F. Supp.2d 944, 963 n.21 (E.D. Wis. 2003) (noting that in reviewing the ALJ's decision, the district court "cannot consider the post hoc arguments of the Commissioner").

[4] The post hoc argument is every bit as relevant to the Commissioner's curious and cursory arguments related to Baldry's credibility on the final page of her brief. Indeed, it is puzzling why this parting shot was made when it does nothing to further the Commissioner's position. If anything, it only serves to create more questions about the ALJ's decision -- if there was a problem in determining the extent of Baldry's medical problems, as the Commissioner now suggests, then the ALJ should have more fully and fairly developed the record. On remand, this point should be considered by the ALJ as well. *See Richards v. Astrue*, 370 F. App'x. 727, 731 (7th Cir. 2010) ("an ALJ may not draw conclusions based on an undeveloped record and has a duty to solicit additional information to flesh out an opinion for which the medical support is not readily discernable"); *Smith*, 231 F.3d at 437 ("failure to fulfill this obligation is 'good cause' to remand for gathering of additional evidence").

ORDER

IT IS ORDERED that the decision of defendant Carolyn W. Colvin, Commissioner of Social Security, denying plaintiff Amy Baldry application for disability benefits is REVERSED AND REMANDED under sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this opinion. The clerk of court is directed to enter judgment for plaintiff and close this case.

Entered this 15th day of April, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge